STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRETT TORRON BRYANT,

Defendant-Appellant.

UNPUBLISHED
June 12, 2003

No. 236314
Wayne Circuit Court
LC No. 00-002398

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, unarmed robbery, MCL 750.530, uttering and publishing, MCL 750.249, stealing a financial transaction device, MCL 750.157n(1), second-degree home invasion, MCL 750.110a(3), and disinterment and mutilation of a dead body, MCL 750.160. We affirm.

On appeal, defendant argues that there was insufficient evidence to support his second-degree murder conviction since no evidence was presented that defendant shot the victim in the head. We disagree. In a sufficiency claim, this Court considers the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendant claims that the second element was not established. However, the circumstantial evidence and reasonable inferences arising from the evidence was sufficient to establish that defendant caused the victim's death. In particular, the evidence included that defendant's stepbrother (1) knew defendant planned on robbing the victim, (2) knew that defendant waited for the victim to come home and then broke the driver's side window out of the victim's truck and beat him on the day of the murder, (3) saw defendant on the night the victim was murdered, (4) saw defendant in a pickup truck that fit the description of the victim's truck, (5) saw a body that fit the description of the victim in the back of the pickup truck that defendant was driving, (6) saw the victim bleeding from the head, and (7) heard his other brother tell defendant that something had to be done with the body. Police officers testified that the driver's side window of the victim's truck was shattered, that there was blood,

the victim's effects, and glass on the victim's yard, and blood in the bed of the victim's pickup truck in the same area that defendant's stepbrother saw the body. The letter defendant wrote to his girlfriend while in jail that was intercepted by police, along with defendant's statement to police, corroborated much of the testimony. In sum, viewed most favorably to the prosecution, the evidence was sufficient to support defendant's second-degree murder conviction.

Next, defendant claims that several instances of prosecutorial misconduct denied him a fair trial. We disagree. Defendant failed to object at any time during the prosecutor's closing or rebuttal arguments, therefore, any claims of misconduct are reviewed for plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court reviews claims of prosecutor misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant argues that there were fifteen instances of prosecutorial misconduct which can be summarized as vouching for witness credibility (e.g., "he has no reason to lie"), improperly claiming personal knowledge (e.g., "I don't believe"), improperly shifting the burden of proof, and misstating the applicable law. We reviewed each allegation and found no error requiring reversal. Although a prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge concerning the witness' truthfulness, *Bahoda*, *supra* at 276, the prosecutor may argue that a witness should or should not be believed based on the facts of the case. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Further, the prosecutor's use of the phrase "I don't believe" was not in a manner that implied his personal knowledge but rather reflected a habit of speech. In addition, a prosecutor may argue that certain evidence is uncontradicted and may contest defendant's evidence without improperly shifting the burden of proof. *People v Reid*, 233 Mich App 457, 478-479; 592 NW2d 767 (1999). Finally, any prejudicial effect of the prosecutor's comments could have been cured by a timely instruction; therefore, reversal would not be warranted. See *Schutte*, *supra* at 721.

Next, defendant argues that he was deprived of a fair trial because, although the trial court agreed to give an aiding and abetting instruction to the jury but did not, the prosecutor improperly referred the jury to the law on aiding and abetting in his closing argument. Because defendant failed to object during the prosecutor's closing argument, our review is for plain error that affected defendant's substantial rights, which defendant has failed to establish. See *Carines*, *supra*. Defendant's claim that "the prosecutor was wrong to ask the court for an instruction on aiding and abetting and the court was wrong to accede to the request" is insufficient to establish such error even if it had merit because such instruction was not given to the jury by the trial court. Further, the prosecutor's reference to aiding and abetting law is insufficient to establish plain error that was outcome determinative because the judge instructed the jury as to the law to apply and instructed the jury that arguments of the attorneys are not evidence.

Next, defendant argues that the trial court failed to properly instruct the jury. We disagree. Jury instructions must be objected to at trial to preserve the issue on appeal. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Here, defense counsel indicated that he was "satisfied" with the court's instructions; therefore, challenges to the

instructions are deemed waived and any error is extinguished. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

In any event, the jury instructions accurately stated the law. First, defendant takes issue with use of the word "satisfied" in the following jury instruction: "This presumption [of innocence] continues throughout the trial and entitles the defendant to a verdict of not guilty, unless you are **satisfied** beyond a reasonable doubt that he is guilty." However, this jury instruction followed verbatim the instruction provided by CJI2d 3.2, an instruction that has repeatedly been determined to adequately convey the concept of reasonable doubt, the presumption of innocence, and the burden of proof. See *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). Consequently, defendant has failed to establish manifest injustice warranting relief. See *Cooper*, *supra*.

Second, defendant claims that the use of the words "should not" in the following jury instruction was erroneous:

> The Prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following: First, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you **should not** consider it.

This instruction was comparable to CJI2d 4.1 and served to accurately and adequately set forth the applicable law. Defendant suffered no manifest injustice.

Next, defendant argues that he was denied a fair trial by the admission of three instances of improper rebuttal testimony. We disagree. Defendant failed to object to the admission of the testimony from two of the witnesses, therefore, our review is for plain error. *Carines*, *supra*. With regard to the testimony of a third witness, our review is for an abuse of discretion. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

Defendant claims that it was improper to re-call two police officers to testify that they did not threaten or harass any of the witnesses into making statements. However, a recurrent theme in defendant's case was that the witnesses succumbed to such police threats and harassment when they made their statements to police; accordingly, this evidence was proper to refute defendant's theory. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Further, defendant testified that he did not make a statement to one of the police officers who, on rebuttal, testified that all personal information contained on defendant's statement, as well as all other information, was given to him by defendant only. Defendant has failed to establish plain error in the admission of this testimony.

Further, the trial court did not abuse its discretion in admitting the rebuttal testimony of Norman Adams. Defendant testified that he did not speak to Adams about the pickup truck involved in the incident, did not take off a roll bar that was on the pickup truck in front of Adams, and was never in possession of the pickup truck. Adams testified in rebuttal that defendant took him to the store in the pickup truck and that he assisted defendant in removing

the roll bar from the pickup truck. The trial court did not abuse its discretion in admitting this testimony.

Finally, defendant argues that his trial counsel was ineffective because he failed to object to the previously discussed jury instructions and prosecutor's arguments to the jury. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As discussed above, the jury instructions were appropriate and adequate and the prosecutor's arguments were permissible; therefore, this issue is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra